BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN THE MATTER OF:

B. M.

vs. NO. 06-26

SHELBY COUNTY SCHOOLS

FINAL ORDER

Procedural History

The parents filed a pro se request for a due process hearing with the Shelby County School System Shelby County School System (herein after "SCS") which was received by the department of education on June 12, 2006. This court issued a pre-conference order dated June 12, 2006 with certain directions for the parties. Subsequently, the court scheduled a telephone conference call with the parties to discuss the issues and the respondent's challenge of sufficiency of the due process request. The petitioners obtained counsel, and on June 27, 2006, the court conducted a telephone conference call with both counsel and discussed the petitioners' counsel's motion to amend the request for due process, the 45 day rule and having to waive it and the issue of "Stay Put". Another conference call was conducted with both counsel on June 30, 2006 to discuss conducting a hearing on the issue of the "Stay Put" placement for the petitioner, the witnesses to be called, when briefs would be due and the issues to be tried at the trial on the merits and the trial date. It was agreed that the trial would be set for October 2 through October 6, 2006. After conference calls with both counsel concerning discovery disputes and the "Stay Put" issue, the court held a pre-trial hearing in Memphis at the offices of the respondent's counsel on July 25, 2006 to address the issue of "Stay Put" for this child. Witnesses were sworn and testimony taken. After receiving the hearing transcript on August 10, 2006 and the DVD of a

television news story involving this child as well as the audio recordings of IEP Team meetings, the court reviewed all of the record at that time including the audio tapes of the IEP Team meetings and the DVD and issued an order concerning "Stay Put" on August 15, 2006 ruling based on the evidence that the "Stay Put" placement was at Faith Christian Academy.

On August 25, 2006, the school system filed a motion for findings of fact and law for "Stay Put" along with supporting documents. The motion was heard by telephone conference call on September 8, 2006. At the conclusion of the motion hearing, counsel for both parties advised the court that they would not be able to complete discovery in time for the scheduled trial date and it was agreed that the trial date would be continued and the trial reset for January 8 through January 12, 2007. On September 12, the court issued a ruling on the motion. On November 11, 2006, the court received an email from counsel for the respondents stating that despite their best efforts, the parties would not be able to conclude discovery in time for the trial in January. As a result the court entered an order resetting the trial date for February 25 through March 2, 2007. During the months of November and December, the court was in contact with counsel for the parties on several occasions by email concerning various discovery and other issues as they arose. On February 1, 2007 the respondents filed a Motion to Reconsider "Stay Put", a Motion to Dismiss Claims Arising Out of the Implementation, Provision or Termination of the Service Plan and a Motion to Dismiss Claims Based on Failure to Provide Procedural Notice each with supporting memoranda and documents. Petitioners filed responsive pleadings to these motions and the court reserved its ruling.

On February 20, 2006 the petitioners filed their pre-trial brief in which they set fourth the issues they asserted to be tried which were as follows:

"1. Failure of Shelby County Schools, hereinafter referred to as SCS, to identify and fully evaluate B.M.'s disability resulting in a denial of FAPE.

2. Failure of SCS to provide services wherein B. M. could meet his IEP behavioral goals in the fourth grade resulting in a denial of FAPE. He was not even identified correctly until January of that school year and only then after the Parents had placed him privately for six weeks at their own expense.

3. Failure of SCS to provide services wherein B. M. could meet his IEP behavioral goals the fifth grade resulting in a denial of FAPE.

4. Failure of SCS to provide procedural due process when B.M. had a change of placement in November 2005, resulting in a denial of FAPE.

5. Failure of SCS to develop a functional behavioral assessment in a timely manner at the change of placement in November 2005, resulting in a denial of FAPE.

6. Failure of SCS to develop a behavior intervention plan in a timely manner at the change of placement in November 2005, resulting in a denial of FAPE.

7. Failure of SCS to inform the Parents that they could disagree with this change of placement as well as failure to explain their procedural due process rights prior to the change of placement in November 2005, resulting in a denial of FAPE.

8. Failure of SCS to place B. M. in the least restrictive environment when he was placed in the STEP program in November 2005, resulting in a denial of FAPE.

9. Failure of SCS to provide B.M. an appropriate education when he was allowed to return to his home school on November 29, 2005. He was not allowed access to the general education and was only allowed to go to school for 2.5 hours resulting in a denial of FAPE.

10. Failure of SCS to provide the least restrictive environment at Dogwood in the November 29th placement as he was only allowed to go to school in a resource room which included first grade students resulting in a denial of FAPE.

11. Failure of SCS to explain to the Parents their procedural due process rights and failure to allow the Parents the opportunity to disagree with the November 29th placement resulting in a denial of FAPE.

12. Failure of SCS to provide B.M. access to the general education program when he returned to Dogwood on November 29, 2005, through the time that he left to attend Faith Christian Academy (hereinafter referred to as FCA) on February 9, 2006. He was isolated from other students his age in violation of his right to be provided FAPE in the least restrictive environment.

13. Failure of SCS to fully explain to the Parents their procedural due process rights in violation of IDEA at the IEP meeting on January 17, 2006, resulting in a denial of FAPE.

14. Failure of SCS to fully explain to the Parents their procedural due process rights in violation of IDEA at the IEP meeting on January 31, 2006, resulting in a denial of FAPE.

15. Failure of SCS to fully explain to the Parents their procedural due process rights in violation of IDEA at the IEP meeting on February 2, 2006, resulting in a denial of FAPE.

16. Failure of SCS to fully explain to the Parents at the IEP meeting on June 6, 2006, their procedural due process rights when notifying the Parents that they will not continue to pay for this agreed upon placement for the upcoming year which is also a change of placement without procedural due process, and, therefore, a violation of the maintenance of placement requirement resulting in a denial of FAPE.

17. Failure of SCS to provide to the Parents' notice of their intent at any IEP meeting and failure to fully explain their procedural due process rights of this intent to remove B.M. from SCS' special education resulting in a denial of FAPE, including the failure to develop an exit IEP from services.

The respondent filed its Pre-hearing Position Statement responding to and denying the allegations of the petitioners and setting fourth their position on the issues to be tried.

This cause came on for trial on the 26th day of February, 2007 and continued until conclusion on March 2, 2007, at the Law offices Of Timothy W. Smith, Esq., in Memphis, Tennessee. Present at the hearing, were Mr. and Mrs. M., Parents of the student, Marcella Fletcher, Esq., attorney for the petitioners, Timothy W. Smith, Esq., attorney for the respondents, Ms. Jo Bellanti and Ms. Beth Schermerhorn, employees of the school system. Both petitioner and respondent proffered witnesses and exhibits which were made a part of the transcript and the record. The parties submitted post trial briefs and proposed findings of fact and conclusions of law after receiving the trial transcript and an opportunity to review the same and having certain personal and business situations which arose. The Court received the trial transcript from the three (3) court reporters who transcribed the record and shows as follows:

Stipulations

At the close of the petitioners' proof at the trail, the parties stipulated that each of the Shelby County teachers listed as witnesses would testify B. M. was under a behavior plan according to them during the time that he was at Dogwood Elementary. They also stipulated that Dr. Henry tested B. M. at the conclusion of his fifth grade year and found him to be at or above grade level based on her testing for a fifth grade student at that time and that her results were

consistent with his prior year's TCAP test scores which are in the record as Exhibit 1 to respondent's pre-trial brief. (Trial Transcript Vol. VII, p. 1186-1187)

Relevant Court Rulings

After the stipulations were announced, the school system made several motions for directed verdict:

1. As to any alleged procedural violations concerning providing of notice to the parents of their rights. The Court ruled that the parents were provided notice of their procedural rights by receiving the Rights Brochure which the Tennessee Department of Education Division of Special Education and approved by the United States Department of Education, and that the petitioners acknowledged receipt of the Rights Brochure by their signature. (Trial Tran. Vol. VII, p. 1190)

2. As to the petitioners' claims that the child was denied a Free and Appropriate Public Education (FAPE) in the fourth and fifth grade. The Court ruled that the child did make meaningful educational progress while a student in the Shelby County School System and that the child was provided FAPE as a result granted the respondent's motion for a directed verdict as to this claim. (Trial Tran. Vol. VII, p. 1193)

3. As to the claim that the child was denied an assistant at the beginning of his fifth grade year. The Court granted the respondent's motion for a directed verdict as to this claim. (Trial Tran. Vol. VII, p. 1194)

4. As to the claim that the child did not have a behavior plan in place. The Court reserved its ruling on this motion. (Trial Tran. Vol. VII, p. 1195)

5. As to the issue of whether or not the child was placed on a service plan. The Court reserved its ruling on that motion. (Trial Tran. Vol. II, p. 1204)

6. At the end of the testimony of Jo Billanti, the respondent made a motion for directed verdict as to the claim that the IEP offered by the respondent failed to provide FAPE. The Court ruled that the IEP offered in June of 2006 would have provided FAPE and granted the motion. (Trial Tran. Vol. VII, p. 1416)

7. Respondent moved to dismiss the claims that a functional behavior assessment was not conducted in a timely manner in November of 2005 which resulted in an improper change of placement, that a functional behavior assessment was not done in a timely manner in November of 2005 and/or that the child was denied procedural due process rights and his placement was changed and/or he was improperly dismissed without a manifestation hearing in November of 2005. The Court after considering all of the evidence ruled that the motion was well taken and granted. (Trial Tran. Vol. VIII, p. 1378-1379)

The Court's rulings on the motions for directed verdict on the various issues have disposed of and dismissed claims number (5), (7), (11), (13), (14), (15), (16) and (17) of the petitioners.

Pending Motions Before the Court

8. Respondent's Motion to Dismiss Claims as Moot as to claims related to the child's placement at Faith Christian Academy (FCA) concerning a "service plan" and the request for an IEP at FCA.

During the trial, Ms. Tammy Mullins, Director of FCA testified that B. M. could no longer go to school there and that the school was "not set up for a situation like that" referring to an incident which happened at FCA during the week of the trial. (Trial Tran. Vol. V, p. 840) As a result of Ms. Mullins' testimony, the petitioners' claims concerning placement at Faith Christian Academy (FCA) either under a "service plan" or under an IEP are moot and the respondent's motion is granted. In addition, as there have been no further claims regarding FCA or placement there and the Court's ruling above, the issue as to whether or not the placement was under a service plan or an IEP is moot and is hereby dismissed. Additionally, as the Court has ruled previously that the placement in FCA was under a "service plan", as a result of the court's ruling that the issues concerning placement under a "service plan" being moot would also render Shelby County's motion do dismiss for lack of jurisdiction moot.

Remaining Claims of Petitioner

After the court's rulings on all motions, the remaining claims of the petitioner are as follows:

1. SCS failed to identify and fully evaluate B. M.'s disability resulting in a denial of FAPE.

2. Failure of SCS to provide services wherein B. M. could meet his IEP behavioral goals in the fourth grade resulting in a denial of FAPE.
3. Failure of SCS to provide services wherein B. M. could meet his IEP behavioral goals the fifth grade resulting in a denial of FAPE.
4. Failure of SCS to provide procedural due process when B.M. had a change of placement in November 2005, resulting in a denial of FAPE.
6. Failure of SCS to develop a behavior intervention plan in a timely manner at the change of placement in November 2005, resulting in a denial of FAPE.
8. Failure of SCS to place B. M. in the least restrictive environment when he was placed in the STEP program in November 2005, resulting in a denial of FAPE.
9. When he was allowed to return to his home school on November 29, 2005, he was only allowed to go to school for 2.5 hours resulting in a denial of FAPE.
10. Further, he was only allowed to go to school in a resource room, which was not the lease restrictive environment, resulting in a denial of FAPE.
12. Failure of SCS to provide B.M. access to the general education program when he returned to Dogwood on November 29, 2005, through the time that he left to attend Faith Christian Academy (hereinafter referred to as FCA) on February 9, 2006. He was isolated from other students his age in violation of his right to be provided FAPE in the least restrictive environment.

Findings of Fact

From a review of all of the evidence, the Court having observed the witnesses in open court and observed their demeanor and determined their credibility, reviewed the record as a

whole including the pleadings and exhibits from the trial and the preliminary hearings, and weighed the evidence, the Court makes the following findings of fact.

1. Beau and Teri M. are the parents of B. M. a thirteen (13) year special needs student in the SCS with a disability as defined under the Individuals Disability Education Act who has been diagnosed with "Asperger's Syndrome" as his primary diagnosis with Language Impairment as his secondary diagnosis for purposes of eligibility for special education services (Note to file of R. Scott Beebe. Ph. D. dated 5/20/05 which is Exhibit G to Shelby County's Pre-hearing Position Statement).

2. Dr. Russell Scott Beebe, Ph. D., a psychologist with the Shelby County Schools, concluded that B's "behavior interfered with his ability to fully benefit from his educational placement" (Trial Tran. Vol. V. p. 771) and diagnosed him as having a primary diagnosis of emotional disturbance for educational purposes.

3. Subsequent to Dr. Beebe's diagnosis, Dr. Robert Hoehn a psychiatrist in private practice in Germantown. Tennessee and the staff psychiatrist at Daybreak Treatment Center (Trial Tran. Vol. I, at p. 6-7) diagnosed B. as having Asperger's Disorder (Trial Tran. Vol. I, p. 138-141) as his secondary diagnosis and anxiety disorder as his primary diagnosis (Trial Tran. Vol. I, p. 66, 71)

4. Dr. Hoehn is not capable of conducting psycho-educational evaluations as a psychiatrist. (Trial Tran. Vol. I, p. 72-72)

5. If medication is not being provided, Dr. Hoehn is not usually involved in a child's care and he primarily practices medication management. (Trial Tran. Vol. I, p. 76)

6. Dr. Beebe agreed to change his diagnosis from the original diagnosis of emotional disturbance (ED) as his primary diagnosis to autism spectrum disorder based on the parents' concerns. (Trial Tran. Vol. V, p. 782-787)

7. Dr. Beebe's diagnosis and the diagnosis of Dr. Hoehn are consistent with each other. (Trial Tran. Vol. V, p. 774 – 775 and 787 – 791)

8. The parents are both well educated, intelligent, affable adults who have exhibited great love, care and concern for their children and especially B.

9. They have been very involved in their son's educational process and attempted to help develop the best educational placement for him, one that they believe would be in his best interest.

10. At all times while a student in the Shelby County School System, B. was identified as a child eligible for and did receive special education services.

11. When he was enrolled in the Shelby County School System, he had a history which reflected that he suffered auditory processing disorder and was also diagnosed with anxiety disorder. (Testimony of Dr. Hoehn - Trial Tran. Vol. I, p. 66, 71 and Dr. Beebe)

12. B. attended Dogwood Elementary School in the Shelby County School System from second grade until he was withdrawn in fifth grade in February 2006 when he was placed in Faith Christian Academy (FCA) but was also placed alternate placements during some of his time at Dogwood.

13. B. has had difficulty with behavior issues the entire time he has been in school, but those issues have increased through the years. (Trial Tran. Vol. I, p. 109, 122, 124, 136; Trial Tran. Vol. V. p. 825; Trial Tran. Vol. VII p. 1109, 1110, 1112, 1115-1120)

14. William "Ken" Carter, one of B.'s teachers, who has had the most experience as a teacher in the SCS with B. while he was at Dogwood testified that B's behavior was often erratic during certain periods of time, but that B. would experience long periods of time where his behavior was very manageable. (Trial Tran. Vol. VII, p. 1109-1112, 1115-1120)

15. Ms. Joyce Keohane is a Student Response Team Consultant with the Shelby County Schools with undergraduate degrees in social studies, general education and physical education and a masters degree in special education. She has taught graduate level classes at the University of Memphis in Applied Behavior Analysis. (Trial Tran. Vol. VII, p. 1214, 1215)

16. Applied Behavior Analysis is considered to be the best practices for working with children who are within the autism spectrum which Asperger's is. (Trial Tran. Vol. VII, p. 1218)

17. Ms. Keohane is also on the Project Reach Team (Trial Tran. Vol. VII, p. 1216- 1217) which is a group of people who train the applied behavior analysis method to school staff and parents. (Trial Tran. Vol. VII, p. 1217-1218)

18. She helped develop some of the initial behavior plan for B. and continued to modify it throughout his time as a student in SCS's (Trial Tran. Vol. VII, p. 1224- 1238)

19. "The M's were always helpful and willing to sit down and talk through the behavior plan" (Trial Tran. Vol. VII, p. 1234-1235)

20. In December of 2004 during his fourth grade school year, his parents placed him in Daybreak Treatment Center a specialized day treatment program to deal with his increased behavior problems as a result of increased behavior problems. This is where he was diagnosed by Dr. Robert Hoehn as having Asperger's Syndrome (Autism Spectrum). (Trial Tran. Vol. I, at p. 139-141)

21. The records from Daybreak show that B. "had been on numerous medications targeting his OCD issues which seemed to make things much worse as he would become increasingly agitated. He has also been on numerous stimulants which made things worse for him." One of the medications he had been on prior to being admitted to Daybreak was Lexapro which dramatically increased his defiance, belligerence both at school and at home according to records. (Exhibit "A" to Shelby County's Pre-hearing Position Statement which is Exhibit 1 in the record)

22. He was in Daybreak for six weeks from December 10, 2004 and discharged from Daybreak on 20 mg of Geodon which according to the made him "much better". (Records of Dr. Hoehn which are Exhibit "B" to Shelby County's Pre-hearing Position Statement which is Exhibit 1 in the record)

23. Daybreak staff attended a transition IEP team meeting in January 2005 and brought their recommendations for B's Behavior Plan. (Trial Tran. Vol. VII, p. 1121-1122)

24. Parts of Daybreak's recommendations for the Behavior Plan were incorporated into B's IEP. A lot of the recommendations were already a part of his plan. (Trial Tran. Vol. VII, p. 1121-1122)

25. He was placed on Geodon the week before 12/28/2004 and was "doing much better" according to the records of Dr. Hoehn. (Exhibit B to Shelby County's Pre-hearing Position Statement which is Exhibit 1 in the record)

26. On 01/14/2005, Dr. Hoehn's records reflect that "He [B] has had a good response to the Geodon. (Exhibit B to Shelby County's Pre-hearing Position Statement which is Exhibit 1 in the record)

27. On 02/17/2005, Dr. Hoehn notes, "Patient overall doing well on interval, he has had some hiccups with his return to regular school and it has been rocky again and every three days he is having a take down at school. Family has gone up on Geodon to 40 mg. and at this time he does seem to be better and we may need to push to 60 mg." (Exhibit B to Shelby County's Pre-hearing Position Statement which is Exhibit 1 in the record)

28. Dr. Hoehn's records can be confusing if you do not read the treatment notes. At the bottom of the first page of his notes it indicates that from 2/17/2005 to 4/18/2005 B. was on 60 mg. of Geodon and from 4/18/2005 to 7/25/2005 the dosage had been reduced to 20 mg. of Geodon. The treatment notes or chart notes reflect differently on the second page. (Exhibit B to Shelby County's Pre-hearing Position Statement which is Exhibit 1 in the record)

29. B. continued to have behavioral difficulties in the fourth grade which required that he be placed in restraints or in a segregated room to deescalate his behavior. Incident reports known as B.A.R.R. (Brief Assisted Required Relaxation) reports recorded these incidents. (Trial Tran. Vol. I, p. 145-146, and Trial Tran. VII, p. 1120-25, Exhibit #3)

30. Dr. Beebe conducted a reevaluation April 14 and 15 2005. (Exhibit 2 to Petitioners' Per-Hearing Brief which is Trial Exhibit 3 in the record)

31. B's dosage of Geodon was reduced in mid April of 2005 and his behaviors began to improve again. (Testimony of Dr. Hoehn, and Dogwood staff, Medical records of Dr. Hoehn which are Exhibit B to Shelby County's Pre-hearing Position Statement which is Exhibit 1 in the record)

32. His medication was changed to Luvox and both Dr. Hoehn and the family reported that he responded well to it and the family was pleased with his response to the medication change. (Dr. Hoehn's medical treatment notes Exhibit B to Shelby County's Pre-hearing Position Statement which is Exhibit 1 in the record)

33. B's fifth grade year began in September 2005 with his behavior under more control, but his behavior deteriorated late in September. (Trial Tran. Vol. 1, p. 158-161)

34. The parents received an undated prior written notice for an IEP Team meeting to be held on September 2, 2005 showing the purpose of the meeting was to revise the IEP by "pull-out language arts and math; pull-out language therapy; discontinue chart and assistant support and OT" which described the action proposed to be taken by the schools system. It also showed the explanation of why the school system proposed the

action, the options considered by the school system, the reasons options were rejected and evaluations, procedures, tests, records or reports the school system used to base their proposal on. (Exhibit 7 to Petitioners' Pre-trial Brief Trial which is Exhibit 3 in the record)

35. The IEP Team meeting minutes reflect that B. was exhibiting positive behavior, "handling stress better, interacting better with peers appropriately and doing well in science and social studies. The plan was to continue language arts and math pull-outs. The goals were reviewed and accepted. The language goals were reviewed and accepted. "The team feels that a behavior plan is not needed at this time due to his success. We will discontinue his chart and he will utilize the regular classroom discipline. This was signed by Mr. and Mrs. M. as well as School personnel as accepting the changes to the IEP." (Exhibit 7 to Petitioners' Pre-trial Brief which is Trial Exhibit 3 in the record)

36. His IEP dated 09/02/2005 reflects that "the student behavior does impede his/ [her] learning" but does not have a check in the box for "Behavior Intervention Plan". (on Page 4 of Exhibit #8 to Trial Tran. Exhibit #3 which is SCS's Post-trial Position Statement) Additionally, on Page 10, it shows no Behavior Accommodations under science and social studies.

37. The Court finds that although the records may be confusing. the behavior plan was modified to discontinue the use of the chart of B's behavior but that the behavior plan was not discontinued and was in use by SCS's throughout B's time as a student in the

SCS's based on the testimony of the Shelby County School staff and specifically Ms. Joyce Keohane.

38. Dr. Hoehn's chart notes dated 7/25/2005 reflect that the family felt that B. had "been more in a fog. Discussed trying Luvox or Seroquell and will try Luvox". (Exhibit B to Shelby County's Pre-hearing Position Statement which is Trial Exhibit 1 in the record)

39. The doctor's chart notes dated 8/29/2005 state, "Patient overall doing much better on interval, he has had much better response to Luvox and his mood is much better and less obsessional. He has been able to play and take golf lessons. He has had excellent reports from school. Mood much better. Family very pleased". (Exhibit B to Shelby County's Pre-hearing Position Statement which is Trial Exhibit 1 in the record)

40. The dosage of Luvox was increased to 50.00 mg. from 9/21/05 to 10/18/05 and to 75.00 mg. from 10/18/05 to 10/27/05 according to Dr. Hoehn's treatment notes. (Exhibit B to Shelby County's Pre-hearing Position Statement which is Trial Exhibit 1 in the record)

41. Another incident of aggression occurred on October 27, 2005. This incident was followed by another aggressive incident on November 3, 2005 (Trial Tran. Vol. III, p. 439 & 450)

42. His dosage of Luvox was decreased to 50.00 mg. from 10/27/05 to 11/7/05 and discontinued on 11/07/05 according to Dr. Hoehn's treatment notes. (Exhibit B to Shelby County's Pre-hearing Position Statement which is Trial Exhibit 1 in the record)

43. In his treatment notes for November 7, 2005, Dr. Hoehn states, "Patient has had a tough interval again, his behavior continued to escalate and he ended up being asked to leave his school and is now being placed in STEP program. Mood has been much more labile and increased dose of Luvox made things worse." (Exhibit B to Shelby County's Pre-hearing Position Statement which is Trial Exhibit 1 in the record)

44. The IEP team met on November 9, 2005 to propose making a change in B. M.'s placement to the Short Term Educational Program (STEP). The parents agreed to the placement in STEP as a result of B's behavior. (Exhibit 11 to Petitioners' Pre-trial Brief which is Trial Exhibit 3 in the record)

45. B. attended the STEP program at Riverdale Elementary School for five days during which time the regular teacher was absent for a number of days. The Parents refused to send him back due to what they considered the inappropriateness of the placement. (Trial Tran. Vol. I, p. 170)

46. While attending STEP, B. received a disciplinary referral. (Exhibit 13 to Petitioners' Pre-trial Brief which is Exhibit 3 in the record) (Trial Tran. Vol. I, at P. 167)

47. An IEP meeting was held on November 28, 2005, at which time it was agreed that he could return to Dogwood on an abbreviated day in the resource class only. He was to be in Mr. Carter's resource room. (Exhibit 14 to Petitioners' Pre-trial Brief which is Exhibit 3 in the record) (Trial Tran. Vol. I, p. 171-72)

48. He started back to Dogwood on November 29, 2005 on a shortened day in a resource class.

49. When B. returned back to Dogwood Elementary, his teacher Mr. Carter and the staff observed that he was "back to normal" and his behavior and anxiety were again under control. (Testimony of Susan Pittman, Ken Carter, Joyce Keohane and Exhibit B to Shelby County's Pre-hearing Position Statement which is Exhibit 1 in the record)

50. On 01/06/06 a prior written notice was issued for which the proposed action by the school system was to "add some hours and develop a behavior plan". The explanation was that a "new behavior plan was needed, more service hours needed to meet goals" the school system considered "continue present program". (Exhibit 15 to Petitioners' Pre-trial Brief which is Trial Exhibit 3 in the record)

51. The IEP Team Staffing Minutes reflect that the purpose of the meeting was to "add service hours, follow behavior plan..." and that "Mr. Carter proposed a new schedule. He feels he needs B. for more time in order to progress towards his IEP benchmarks". The proposed schedule is also part of the IEP Team Staffing Minutes (Exhibit 16 to Petitioners' Pre-trial Brief which is Trial Exhibit 3 in the record) The parents signed as being in attendance at this meeting.

52. "On January 9. 2006, the Memphis local ABC television station reported a story from the Dogwood School concerning 'zero tolerance.' The story alleged that a child with a disability can get into trouble and can avoid the 'zero tolerance' punishments. The story did not identify the student by name. However, it is apparent that the story was directed at this student and that it was very traumatic for the family. (Order of August 15, 2006)

53. The family believed that someone from the school system had given the television reporter information for the story because of the detail that was reported. The school system maintained that no one from the school system gave any information to the reporter and that their policy was to not comment and they followed their policy.

54. The school system investigated and found no evidence that any employee of Shelby County had anything to do with the story. (p. 186 of Transcript from "Stay Put" hearing)

55. There is no evidence in the record that the school system gave any information to the television reporter or station.

56. The parents made it clear to Dr. Hoehn that they could not let B. stay at Dogwood. (Trial Tran. Vol. I, p. 80)

57. "Mr. M. asked additional information about .... as to how information was given to media. We did not give information to the media. Parents of other children had sent letters of concern after the Nov. 3, 2005 incident but SCS did not speak to media after the news report on 1/9/06. parents did speak to Mrs. Simpson with concerns" (p. 5 of Exhibit 19 of Petitioners' Pre-trial Brief which is Exhibit 3 in the record)

58. In correspondence dated June 6, 2006, the M's state, "another reason B cannot attend SCS is a result of the news story that was aired about him in January 2006. Our belief and that of our counsel is that a representative of SCS leaked confidential information about B's medical and educational history to another parent and was then subsequently passed on to Channel 24 News. Also, as a result of this story. we have been forced to remove our daughter as well from Shelby County Schools.....As a

result, the only Free and Appropriate Educational Setting for B. M. is at Faith Christian Academy." (Exhibit M to Shelby County's Pre-hearing Position Statement which is Exhibit 1 in the record)

59. On January 17, 2006, an IEP meeting was held to discuss a change of placement for B. and additional meetings were held after that.

60. "The school system proposed several other placements, such as Day Break, Lakeside, Brunswick and others." ("Stay Put" Order and Trial Tran. Vol. V, p. 753-754)

61. The prior written notice (Exhibit 18 to the Petitioners' Pre-Trial Brief which is Trial Exhibit 3 in the record) states as the "description of the action proposed by the School System: The team proposes to investigate placement outside SCS to meet B...'s needs."

62. At the IEP Team meeting on January 17, 2006, the team and the parents discussed possible placements outside Dogwood. The principal at Dogwood, "Mrs. Simpson, related how concerned she is that we [Dogwood] are not able to meet the academic goals/benchmarks due to trying to keep B. calm..... Ms. Simpson discussed how she feels that the team needs to explore other options to meet B's needs. STEP was discussed" (p. 4 of Exhibit 19 in Petitioners' Pre-trial Brief which is Trial Exhibit 3 in the record) (Trial Tran. Vol. III, p. 453 and Trial Tran. Vol. V, p. 752-753 – testimony of Mr. M.)

63. "Dr. Terry Browning, school psychologist, related information concerning STEP and the difference between when he [B] was there in November & now. Staff has been

increased" (p. 4 of Exhibit 19 in Petitioners' Pre-trial Brief which is Trial Exhibit 3 in the record)

64. "Mr. M. does not believe that STEP is appropriate.... Mr. M. related his strong opposition to placement in STEP." (p. 5 of Exhibit 19 in Petitioners' Pre-trial Brief which is Trial Exhibit 3 in the record)

65. "Ms. Simpson related that she will investigate possible placement outside Dogwood as to the availability of Daybreak facility to help meet B's needs" (p. 5 of Exhibit 19 in Petitioners' Pre-trial Brief which is Trial Exhibit 3 in the record)

66. On January 31, 2006 the IEP Team met and advised the parents that the school system felt that STEP (Short Term Educational Placement) was the best placement for their son at that time and an appropriate placement for him. The parents rejected the placement recommendation of the school system. After the parents rejected the STEP program, the school system discussed alternative placements with them including offering to pay for private school tuition under a service plan. (Exhibit 20 in Petitioners' Pre-trial Brief which is Trial Exhibit 3 in the record)

67. The parents at one of the meetings proposed Faith Christian Academy (FCA), and the school system employees did not know about FCA and requested more information.

68. At the IEP meetings after the ABC television story, the parents were advised by Ms. Laura Corby a parent advocate. ("Stay Put" hearing transcript)

69. The parents and Ms. Corby questioned the school system about what the difference was between a service plan and an IEP because neither Ms. Corby nor the parents knew what a service plan was.

70. Ms. Corby left the IEP meeting to make a call to Ms. Jeanness Roth. Ms. Roth told Ms. Corby to advise the parents to accept the service plan and "Ms. Roth said that the difference was a funding issue as Ms. Schermerhorn, special education curriculum specialist for SCS's, had told them." ("Stay Put" Order and P. 243 of "Stay Put" Hearing transcript)

71. Ms. M testified at the "Stay Put" hearing that "they had spoken with Dr. Hoehn before the January 31st meeting and that he advised them that STEP would be detrimental to B." (P. 22-23 of Stay Put Hearing transcript)

72. "Mr. M. testified that the placement offered by the school system was not anything new except new building, new faces and a "fresh start" and that if they had offered something new the parents would have considered it." ("Stay Put" Order and P. 249-250 of "Stay Put" Hearing Transcript)

73. Ms. Schermerhorn testified at the "Stay Put" hearing that she advised the parents that if they rejected the STEP placement, they could file an administrative complaint, request mediation or due process. (p. 133 "Stay Put" transcript)

74. Further, Ms. Schermerhorn testified that the school system believed that they could provide FAPE in the STEP placement, but because of the media event they were open to options. (P. 130 "Stay Put" transcript)

75. The minutes of the January 31 IEP Team meeting reflects that Ms. Schermerhorn advised the parents that the only difference between a service plan and an IEP was that due process safe guards are not available in a service plan. ("Stay Put" Order)

76. Another IEP Team meeting was held on February 2, 2006 and after discussions and the refusal of the IEP Team recommendation of a STEP placement with an IEP, it was agreed that B. would be placed in FCA under a service plan.

77. The school system employees advised the parents that they would lose their right to a due process hearing if they accepted a service plan.

78. Mr. M. understood that his son would be under a service plan. (Transcript from "Stay Put" Hearing P. 235)

79. Ms. M. testified at the "Stay Put" hearing that she did not understand that by accepting a service plan would give up their due process rights and that she did not even know what due process was. She further testified that if she had known she would have never agreed to the service plan. (p. 82-83 of "Stay Put" hearing transcript)

80. B. attended FCA from February 9, 2006 through February 27, 2007 when he was asked not to return as a result of an incident at FCA which the staff at FCA was not equipped to deal with situations such as that one. (Trial Tran. Vol. V, p. 840)

81. SCS paid for the B. M. to attend FCA during that time under a "service plan" during that time.

82. B. M. was dismissed from FCA because of aggression toward staff on February 27, 2007. (Trial Tran. Vol. V, at P. 840)

83. FCA has advised the parents that based on the incident occurred at FCA when B. exhibited violent behavior, FCA could not allow him to return to their school as they were not capable of handling such behaviors. (Testimony of Tammy Mullins)

84. This Court has ruled that SCS's can provide FAPE for B. M. based on the record as a whole.

85. ***Petitioners allege that SCS's failed to identify and fully evaluate B. M.'s disability which resulted in a denial of FAPE.*** Dr. Russell Scott Beebe, Ph. D., a psychologist with the Shelby County Schools, concluded that B's "behavior interfered with his ability to fully benefit from his educational placement" (Trial Tran. Vol. V, p. 771) and diagnosed him as having a primary diagnosis of emotional disturbance for educational purposes.

86. Dr. Robert Hoehn is a psychiatrist in private practice in Germantown, Tennessee and the staff psychiatrist at Daybreak Treatment Center (Trial Tran. Vol. I, at p. 6-7) diagnosed B. as having Asperger's Disorder. (Trial Tran. Vol. I, p. 138-141) as his secondary diagnosis and Anxiety Disorder (NOS-Not Otherwise Specified) as his primary diagnosis (Trial Tran. Vol. I, p. 66-71 and Exhibit B to Shelby County's Pre-hearing Position Statement which is Exhibit 1 in the record)

87. Dr. Hoehn is not capable of conducting psycho-educational evaluations as a psychiatrist. (Trial Tran. Vol. I, p. 72-72)

88. If medication is not being provided, Dr. Hoehn is not usually involved in a child's care and he primarily practices medication management. (Trial Tran. Vol. I, p. 76)

89. Dr. Beebe agreed to change his diagnosis from the original diagnosis of emotional disturbance (ED) as his primary diagnosis to autism spectrum disorder based on the parents' concerns. (Trial Tran. Vol. V, p. 782-787)

90. Dr. Beebe's diagnosis and the diagnosis of Dr. Hoehn are consistent with each other. (Trial Tran. Vol. V, p. 774 – 775 and 787 – 791)

91. There were no changes to the goals, objectives, present levels of performance or present levels of functioning of B's educational program as a result of the change in B's diagnosis and there was no testimony that there were any changes recommended to goals, objectives, present levels of performance or present levels of functioning to be made to his educational program as a result of the change.

92. There is no evidence in the record that the change in the educational record from the educational diagnosis of ED to medical diagnosis of Asperger's Syndrome changed, modified or otherwise effected his education or the program offered by FCA or SCS's. The testimony of Joyce Keohane was that there were no behavior techniques that Daybreak recommended that were not already in B's behavior plan (Trial Tran. Vol. VII, p. 1263) after he returned from Daybreak where he had been diagnosed with Asperger's Syndrome.

93. B's educational record contains numerous psycho-educational evaluations from various times during his education and show that the school system consulted with some of the best professionals in the State of Tennessee to provide an appropriate understanding of what he needs to provide him a Free Appropriate Public Education.

94. Further, the testimony of Dr. Hoehn indicates that from day to day it is difficult to determine what may cause a child with Asperger's such as this student to regress, and there is no way to separate out whether it is the medication or environmental stresses. (Trial Tran. Tran. Vol. I, p. 40, 61)

95. There is no evidence in the record that if there was a failure to identify or fully evaluate this student that it resulted in any educational harm to B.

96. ***The petitioners' allege that SCS failed to provide services designed to allow B.M. to meet his behavioral goals contained in his IEP's in fourth and fifth grades resulting in a denial of FAPE.(Claims 2 and 3 combined) and in claim number 5 that SCS's failed to develop a behavior intervention plan in a timely manner***

97. The parties stipulated that each of the Shelby County teachers listed as witnesses would testify B. M. was under a behavior plan according to them during the time that he was at Dogwood Elementary. (Trial Tran. Tran. Vol. VII, p. 1186)

98. Ms. Keohane helped develop some of the initial behavior plan for B. and continued to modify it throughout his time as a student in SCS's (Trial Tran. Vol. VII, p. 1224-1238)

99. The IEP Team meeting minutes dated 9/02/2005 reflect that B. was exhibiting positive behavior, "handling stress better, interacting better with peers appropriately and doing well in science and social studies. The plan is to continue language arts and math pull-outs. The goals were reviewed and accepted. The language goals were reviewed and accepted. The team feels that a behavior plan is not needed at this time due to his success. We will discontinue his chart and he will utilize the regular classroom discipline. This was signed by Mr. and Mrs. M. as well as School personnel as accepting the changes to the IEP (Exhibit 7 to Petitioners' Pre-trial Brief which is Trial Exhibit 3 in the record)

100. SCS's consulted with several specialists in the area of Autism Spectrum Disorder such as Project REACH, a program dedicated to education of students with Autism. The behavior plan appeared to be in a state of continual change to reflect the then current needs of B. M. The behavior chart was discontinued. An assistant was added to B's behavior management plan in May of 2005 and as a result of his success with his behavior the IEP Team discontinued the use of the assistant later. (Exhibit 7 to Petitioners' Pre-trial Brief which is Trial Exhibit 3 in the record)

101. B's medications were in a constant state of adjustment based on what was going on at the time. (Exhibit B to Shelby County's Pre-hearing Position Statement which is Exhibit 1 in the record)

102. Although he had instances of behavior issues, the court can not make a determination as to the cause of those instances just as Dr. Hoehn could not. Dr. Hoehn testified that there is no way to separate out what is environmental and what is medication. (Trial Tran. Vol. I, p. 40, 61)

103. From all of the above, the Court finds that there is no proof in the record that SCS's failed to develop a behavior intervention plan in a timely manner or failed to provide services that would allow B. M. to achieve his behavior goals as set fourth in his IEP. Further, the Court has determined that SCS's attempted to make changes on an ongoing basis to his behavior plan in an attempt to allow him the best opportunity to meet those goals. However, according to Dr. Hoehn's testimony, it is difficult to know what the triggers are for a student with Asperger's Syndrome. The Court does note that the records of SCS's are confusing and not filled out in a manner in which

they can accurately be interpreted and this is a violation of the procedural safeguards of IDEA. However, these violations do not appear from the record to be violations which have violated the child's rights to his educational opportunity or denied him FAPE.

104. ***Petitioners allege in claim number 4, 7, 11, 13-17 that Shelby County failed to provide procedural due process when they changed B.'s placement in November 2005, failed to inform the parents that they could disagree with a change in placement prior to the change when B.M. had a change of placement in November 2005 Failed to explain to the Parents their procedural due process rights and failed to allow the Parents the opportunity to disagree with the November 29th placement were all violations of IDEA, failed to fully explain to the Parents their procedural due process rights in violation of IDEA at the IEP meeting on January 17, 2006, failed to fully explain to the Parents their procedural due process rights in violation of IDEA at the IEP meeting on January 31, 2006, failed to fully explain to the Parents their procedural due process rights in violation of IDEA at the IEP meeting on February 2, 2006, failed to fully explain to the Parents at the IEP meeting on June 6, 2006, their procedural due process rights when notifying the Parents that they will not continue to pay for this agreed upon placement for the upcoming year which is also a change of placement without procedural due process, allegedly being a violation of the maintenance of placement requirement, failed to provide to the Parents' notice of their intent at any IEP meeting and failed to fully explain their procedural due process rights of this intent to remove B.M. from SCS' special education each resulting in a denial of FAPE***

105. The Court has reviewed the record and determined that the parents were involved in every IEP meeting and had been provided the rights brochure titled "The ABCs of IDEA: Understanding Your Child's Rights" as shown by one of their signatures on the Prior Written Notice and that they were given an opportunity to review the IEP

Team notes and make any changes or corrections but they never read the rights. Ms. M. testified that, "...they've always just said, "here's a booklet of your rights." And we never – dawned on us to open it up and read it. I mean, we didn't think it pertained to us." (Trial Tran. Vol. II, p. 200)

106. Further the Court finds that the Rights Brochure which was developed and approved by the Tennessee Department of Education Division of Special Education which was given to the parents satisfies the requirements of the Tennessee Rules and Regulations and IDEA.

107. Mr. M. testified that he had been provided the Rights Brochure approximately twenty-one (21) times before his son was placed in FCA. (Trial Tran. Vol. III, pgs. 556-557, 559, and 658)

108. He also testified that the Rights Brochure gives explanation of a student's rights under IDEA. (Trial Tran. Vol. III 556-557, 559, and 658)

109. Mr. M. testified that he had never read the Rights Brochure. (Trial Tran. Vol. III, p. 661 and 664)

110. The parents were given an opportunity to ask question at each IEP Meeting and review the notes from the meeting. (p. 241 "Stay Put" Hearing)

111. There is no proof in the record that the Court can find that the parent gave up their procedural due process rights when their son was moved to STEP in November 2005.

112. They had the opportunity to pursue their due process rights as well as disagree with a change in placement. However, they did not review the rights brochure that was given to them.

113. ***Concerning claim number 6 failure of SCS to develop a behavior intervention plan in a timely manner at the change of placement in November 2005, resulting in a denial of FAPE.***

114. When a Functional Behavior Intervention Plan not being prepared in a timely manner, when a child exhibits new behavior under if a Functional Behavior Intervention Plan is in place, it should be reviewed and modified.

115. The Court finds that the behavior exhibited was not new behavior, but a different manifestation of prior behavior and as a result a new Functional Behavior Intervention Plan did not need to be developed.

116. The Functional Behavior Plan that was in place was constantly being reviewed and revised according to what was going on at the time.

117. The parents were provided their rights at each and every meeting and were asked if they had any questions. They had no questions that were not answered according to Mr. M.

118. The parents failed to review the Rights Brochure provided on numerous occasions.

119. There is no proof in the record that SCS's violated the rights of the petitioners concerning any of these claims.

120. ***Concerning the allegations that the failure of SCS to place B. M. in the least restrictive environment when he was placed in the STEP program in November 2005, that they failed to provide B.M. an appropriate education when he was not allowed access to the general education and was only allowed to go to school for 2.5 hours and the failure of SCS to provide the least restrictive environment at***

Dogwood in the November 29th placement by placing him in a resource room which included first grade students resulted in a denial of FAPE (Claims 8, 9 and 10) the Court finds:

121. Placement in the STEP program was a decision made by the IEP Team which included the parents after a "sudden regression" and an incident at school. (Trial Tran. Vol. I, p. 58-59)

122. Prior written notice was received by the parents and signed by them. (Exhibits in the record)

123. After a short time (5-6 days) Mr. M. became concerned when B. heard a curse word and was warned for kicking another student and requested that B. be returned to Dogwood.

124. The STEP program is for short term placement for student to transition back to the regular educational program that includes age appropriate peers that does "a lot of work on goal setting, appropriate behavior, replacement behaviors and looking at coping strategies." (Trial Tran. p. 1299)

125. Dr. Hoehn testified that during times of behavior problems he would recommend B. being placed in a more isolated, smaller classroom with a familiar instructor. (Trial Tran. Tran. Vol. I, pg. 75-76)

126. The placements at both STEP and the return to Dogwood were consistent with what Dr. Hoehn recommended.

127. After Mr. M. met with the principal at Dogwood, Mrs. Pittman, to discuss B. returning to Dogwood the IEP Team met on November 28, 2005 and agreed to transition him back

128. The parents signed the Prior Written Notice dated November 28, 2005 revising B's IEP and that they had received the Rights Brochure (Exhibit K to Shelby County's Pre-hearing Position Statement which is Exhibit 1 in the record)

129. B. was returned to Dogwood on an abbreviated schedule in an effort to transition him back and on January 6, 2006 the IEP Team determined that he was doing well and that his program should be increased. (Exhibit L to Shelby County's Pre-hearing Position Statement which is Exhibit 1 in the record)

130. There is no proof in the record that the STEP program was not the least restrictive environment or the limited program at Dogwood in January 2006 violated these provisions of IDEA.

Conclusions of Law

Each state is required to identify, locate and evaluate every child eligible for special education services and provide a "Free Appropriate Public Education (FAPE)" 20 USC 1412(2) (C) and 20 USC 1401(a) (18). They are also required to pass rules and regulations in compliance with the IDEA. The "Free Appropriate Public Education" (FAPE) provision is satisfied by providing such personalized instruction which include sufficient support services to permit the child to benefit educationally from that instruction. Board of Education of Hendrick Hudson Central School District v. Rowley, 485 U.S. 176 and 204, 102 S. Ct. 3034 (1982)

In construing the IDEA's requirements for a free appropriate public education, the federal courts repeatedly have emphasized that public schools are not required to maximize a disabled student's educational potential. Wilson County School System v. Clifton, 41 S.W.3d 645, 650 (Tenn. Ct. App. 2000) (citations omitted). In this regard, the IDEA requires only that public schools "provide children with disabilities appropriate education, not the very best possible special education services." Id. *citing* Wise v. Ohio Dept. of Educ., 80 F.3d 177, 185 (6th Cir. 1996) (citations omitted). The IDEA "provides no more than a 'basic floor of opportunity.'" Id. *citing* Doe v. Board of Education, 9 F.3d 455 (6th Cir. 1993)(citations omitted); see also Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 132 (2nd Cir. 1998)(noting that IEP need not maximize child's potential, offer superior opportunities, or provide optimal level of services).

Based on the prior courts rulings that a school system need not maximize a child's education to provide "FAPE", a court reviewing a matter must focus primarily on the proposed placement, not on what the family prefers. Tucker v. Calloway County Bd. of Educ., 136 F. 3d 495 (6th Cir. 1998) (additional citations omitted). In determining what is appropriate to meet the needs of a disabled child, school systems and districts are given discretion. McLaughlin v. Holt Public Schools Board of Education, 320 F.3d 663 (6th Cir. 2003) *citing* Burilovich v. Board of Educ. of Lincoln Consol. Sch., 208 F.3d 560, 566 (6th Cir. 2000) ("The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the [IDEA] to state and local educational agencies in cooperation with the parents or guardian of the child")

The burden of proof is on the parent to prove by a preponderance of the evidence that the individualized education plan proposed by the school violates the IDEA. McLaughlin v. Holt

Public Schools Bd. Of Educ., 320 F.3d 663 (6th Cir. 2003) citing 20 U.S.C.A. §§ 1412(a) (1) (A) (5). 1414(d) (1) (A, B), 1415(b) (6); Knable v. Bexley City School Dist., 238 F.3d 755 (6th Cir. 2001). The school district does not have the burden of proving procedural compliance. Cordrey v. Euckert, 917 F.2d 1460 (6th Cir. 1990).

A school district is only required to provide educational programming that is reasonably calculated to enable the child to derive more than *de minimis* educational benefit. Doe ex rel. Doe v. Smith, 879 F.2d 1340, 1341 (6th Cir. 1989).

1. The Court finds that B. M., a special education student in Shelby County Schools, was located, identified and evaluated by the school system. An Individualized Educational Program was developed for B. M. based on the information gathered, evaluations provided and continually modified based on actions, situations, events concerning this student and input from the parents. The record shows that he made educational progress during his education. At all times Shelby County Schools provided a Free Appropriate Public Education to B. M.

The Tennessee Rules and Regulations sets fourth guidelines for special education children to transition out of special education and IDEA protection based on the federal guidelines of IDEA. First, they set out what must occur when a special education child transitions out of special education. Tenn. Comp. R. & Regs. 0520-1-9-.13 state:

TRANSITION FROM SPECIAL EDUCATION SERVICES.
(1) A child shall no longer be eligible to receive special education and related services from a local school system when the IEP team determines one of the following:

(a) The child no longer meets the Tennessee criteria or no longer requires special education and related services;
(b) The child has been awarded a regular diploma; or
c) The child's age is twenty-two (22) years, except that any child eligible for special education who turns twenty-two (22) between the commencement and the conclusion of the school year will continue to be a child eligible for special education for the remainder of the school year.

In this case, none of these criteria has been met with this student. B. M. is still a Shelby County special education student who has not graduated nor has he aged out of the system. There has been no exit IEP for this student to remove him from SCS' special education. He was at all times a special education student in the SCS's.

IDEA sets out at 20 U.S.C.A. § 1415 (K)(I) what the school system is required to do in the event a special education student with behavior problems exhibits new behaviors. It states:

> (I) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement described in subparagraph C) or (G);
> **(ii)** in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as part of the modification of the behavioral intervention plan.

This Court has ruled that the behavior exhibited by B. M. is not new behavior and that the behavior intervention plan was modified on a continual basis.

Procedural Safeguards for students with special needs is set fourth as follows:

20 U.S.C. § 1415 (d) (2)
The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents (unless it clearly is not feasible to do so) and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to–

(A) Independent educational evaluation:
(B) prior written notice;
(C) parental consent;

(D) access to educational records;

(E) the opportunity to present and resolve complaints, including–

(i) the time period in which to make a complaint:

(ii) the opportunity for the agency to resolve the complaint; and

(iii) the availability of mediation;

(F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(J) State-level appeals (if applicable in that State):

(K) civil actions, including the time period in which to file such actions; and

(L) attorneys' fees.

The Supreme Court has long held these procedural rights to be the cornerstone of IDEA. Justice Rehnquist wrote for the Court in *Burlington v. Dept. of Ed.*, 471 U.S. 359, 361, 105 S. Ct. 1996 (1985), wherein he stated:

The Education of the Handicapped Act (Act), 84 Stat. 175, as amended, 20 U.S.C. § 1401 *et seq.*, requires participating state and local educational agencies "to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education" to such handicapped children. § 1415(a). These procedures include the right of the parents to participate in the development of an "individualized education program" (IEP) for the child and to challenge in administrative and court proceedings a proposed IEP with which they disagree. §§ 1401(19), 1415(b), (d), (e).

Rehnquist continued to discuss the importance of procedural safeguards. He states:

Congress stated the purpose of the Act in these words: "to assure that all handicapped children have available to them ··· a free appropriate public education which emphasizes special education and related services designed to meet their unique needs [and] to assure that the rights of handicapped children and their parents or guardians are protected." 20 U.S.C. § 1400(C). *Id* at 367.

He continues to lay down the foundation of why Parents need procedural safeguards. He continues:

Apparently recognizing that this cooperative approach would not always produce a consensus between the school officials and the parents, and that in any disputes the school officials would have a natural advantage, Congress incorporated an elaborate set of what it labeled "procedural safeguards" to insure the full participation of the parents and proper resolution of substantive disagreements. Section 1415(b) entitles the parents "to examine all relevant records with respect to the identification, evaluation, and educational placement of the child," to obtain an independent educational evaluation of the child, to notice of any decision to initiate or change the identification, evaluation, or educational placement of the child, and to present complaints with respect to any of the above. The parents are further entitled to "an impartial due process hearing," which in the instant case was the BSEA hearing, to resolve their complaints. *Id* at 368-69.

He concludes the very purpose of the Act was to assist handicapped children to have a free appropriate public education. He states, "The Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives." *Id* at 372. For a school district to offer a placement to a Parent free of charge if and only if the Parents give up their procedural due process rights would be the very antithesis of the Act's purpose. Conversely if they insisted upon their unexplained procedural due process rights, the placement will be neither appropriate nor free. This is a Hobbesian choice the IDEA does not require the

> Parents to make. They are not required to choose between rights and services. They are entitled to both.

The Supreme Court has noted, "Therefore, a Court's inquiry in suits brought under _ 1415 (e)(2) is twofold. First, has the State complied with the procedures set fourth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits." *See, Board of Education v. Rowley*, 102 S. Ct. 3034, 3051 (1982). Strict compliance with procedural safeguards is required. *See. Babb v. Knox County School System*, 965 F.2d 104 (6th Cir. 1992). A sufficiently serious procedural failure by a school system can lead to a finding of inappropriateness. *See, Doe v. Metropolitan Nashville Public Schools*. 133 F.3d 384 (6th Cir. 1998) citing *Ash v. Lake Oswego School District*, 980 F.2d 585, 589 (9th Cir. 1992) and *Hall ex rel. Hall v. Vance County Board of Education*, 774 F.2d 629, 635-36 (4th Cir. 1985).

2. The Court concludes from all of the evidence that in this case, SCS's has complied with all provisions of the requirements of Due Process and Equal Protection provisions of State and Federal law. The school system provided the rights to the parents in the brochure they give to parents titled "The ABCs of IDEA: Understanding Your Child's Rights" which has been provided by the State of Tennessee Department of Education Division of Special Education and approved by the United States Department of Education. The parents were provided this brochure at least twenty-one (21) times according to the testimony of Mr. M. The parents further testified that they never looked at the rights brochure until after this litigation was begun. The parents participated in every IEP meeting for their son and have been actively involved in the process from the time when he became a student with Shelby County Schools. They had an advocate assist them in IEP meetings. Unfortunately for them, their advocate no

matter how well meaning she may have been did not know what she needed to know to properly assist them in this situation. She even contacted another person who appears to not have known enough to properly advise them. The parents were given an opportunity by their own testimony to ask questions and did ask questions. The Court rules that they did participate in their son's education.

The Court rules that the school system did commit procedural violations concerning their documentation. It is the Court's obligation once the court has determined that procedural violations occur to determine if those procedural violations caused harm to the student's education. Based on the Court's review of the record, it is the opinion of the Court that these procedural violations although causing confusion for the parents did not deprive the student of FAPE.

For the Court to order compensatory education or reimbursement for expenses paid for by the parents, the Court must make a finding that the school district did not provide FAPE to the student and that private placement is appropriate for the student. 34 CFR §300.148(c). The school district is not responsible for private school placement if they can provide an appropriate placement for the student. See W.C. by Sue C. v. Cobb County Sch. Dist., 44 IDELR 273 (Dec. 2005) In W. C. by Sue C. the Court held that the child received FAPE at the public school, noting that he made academic progress in both fourth and fifth grades and that the parents were not entitled to private school placement.

3. Based on all of the evidence in the record, the Court has determined that Shelby County Schools provided FAPE and that the claim for private school placement, reimbursement or compensatory education fails and is therefore dismissed.

4. Based on the reasons stated herein above, the Court has ruled that as the school district has provided FAPE and the request for a service plan is hereby denied and dismissed.

From all of which the Court finds that B. M. was provided FAPE at all times and any procedural violations were not sufficient to deny FAPE and;

IT IS HEREBY ORDERED the claims of the petitioners are hereby dismissed.

ENTERED this the 24th day of July 2007.

WILLIAM T. AILOR
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been mailed in the U. S. Mail, with sufficient postage affixed thereto, to Bill Wilson, Staff Attorney, State of Tennessee Department of Education, 5th Floor, Andrew Johnson Tower, 710 James Robertson Parkway, Nashville, TN 37243, Timothy W. Smith, Esq., attorney for school system, 2670 Union Extended, Suite 1200, Memphis, TN. 38112 and , Parents, Germantown, TN. 38139, on this the 24th day of July 2007.

WILLIAM T. AILOR

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order. In appropriate cases, the reviewing Court may order that this Final Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court, under provisions of section 49-10-601 of the Tennessee Code Annotated.

Within sixty (60) days from the date of this order (or thirty [30] days if the Board of Education chooses not to appeal), the local education agency shall render in writing to the District Team Leader and the Office of Compliance, Division of Special Education, a statement of compliance with the provisions of this order.